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July 14, 2005

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F Street
Washington, DC 20549-9303

Re: File Number SR-NASD-2003-158

Dear Mr. Katz:

Charles Schwab & Co., Inc. ("Schwab") welcomes the opportunity to comment on SR-NASD-2003-158, the NASD's proposed restructuring of the NASD Code of Arbitration Procedure ("the Code"), and, in particular, three specific aspects of the proposed Code of Arbitration for Customer Disputes. Schwab recognizes that a revamping of the Code affects the interests of several different parties, including public investors, NASD member firms and their associated persons, and the NASD's own Dispute Resolution subsidiary. Mindful of these multiple and sometimes competing interests, Schwab submits its comments on the three specific proposed rule changes with the intention of contributing to the development of a fair and balanced Code of Arbitration for Customer Disputes.

I. PROPOSED RULE 12400

Proposed Rule 12400 addresses the neutral list selection system and the selection of arbitrators from three lists: a roster of non-public arbitrators; a roster of public arbitrators; and a roster of arbitrators eligible to serve as chairperson of a panel.

The proposed rule, as drafted, is unclear as to whether public arbitrators who are eligible to be placed on the newly created chairperson roster would also remain on the general public arbitrator roster. SEC Release Number 34-51856 interprets Proposed Rule 12400 to state that:

> "[p]ublic arbitrators . . . will be placed on the chairperson roster only if they agree to serve as chairpersons; otherwise, they will remain on the general public arbitrator roster. To avoid duplication of names on the lists sent to the parties, arbitrators who are on the chairperson roster will not be on the general public arbitration roster." *(Federal Register Vol. 70, No. 120, 36442, 36446 (June 23, 2005)).*

Schwab has no objection to the NASD's proposal to have a separate chairperson roster as long as arbitrators who are eligible to be listed on the chairperson roster also remain eligible to be listed on the general public arbitrator roster. If a particular arbitrator is on the chairperson roster but not among the seven names listed on the chairperson roster for a specific case, Schwab believes that the arbitrator should be eligible to be listed on the general public arbitration roster for that case. This approach will not create duplication of names on arbitrator lists. Schwab agrees that a specific arbitrator's name should not appear on both lists in the same case.

If it is the intention of the NASD to segregate public arbitrators into mutually exclusive chairperson and non-chairperson rosters, Schwab respectfully objects to the proposed rule. If Proposed Rule 12400 is interpreted in this manner, it would decrease the pool of experienced, knowledgeable public arbitrators, particularly in regions of the country where the size of the arbitrator pool is already limited. In these cases, the pool of experienced public arbitrators would be significantly diluted. Schwab believes that this change would result in arbitration panels having less overall experience and expertise than they currently have, and would be detrimental to all parties.

At least one of the comments to this proposed rule that has already been submitted by claimants' counsel echoes Schwab's belief that arbitration panels should include the most experienced and most knowledgeable public arbitrators available. In addition, the PIABA comment letter notes that "the choice on arbitrators' experience levels for particular cases should belong to the investor." Schwab believes both parties should have the ability, if they so choose, to select a panel consisting of the most experienced and knowledgeable public arbitrators.

Proposed Rule 12403 grants each party five strikes on each of the three seven-person arbitrator lists. Accordingly, since each party will retain the option to strike more than seventy percent of the arbitrators on each list, claimants and respondents would be free to exercise their strikes on any arbitrator they did not want to serve on the case. Proposed Rule 12400, however, would limit the parties' opportunity to mutually select two more experienced public arbitrators, which would be a disservice to all parties and to the arbitration process generally.

II. PROPOSED RULE 12504

Proposed Rule 12504 provides that motions to decide claims before a hearing on the merits are discouraged and may be granted only in extraordinary circumstances. Schwab respectfully objects to this proposed rule.

Comments to this proposed rule submitted by claimants' attorneys suggest that dispositive motions are *per se* abusive and are routinely and frivolously filed by brokerage firms. The other side of this argument, of course, is that some claimants and their attorneys regularly file specious claims against brokerage firms and against their associated persons for the sole purpose of attempting to coerce settlements.

Schwab believes that in certain limited scenarios, dispositive motions are appropriate. Instead of codifying a bar on dispositive motions, the NASD should continue to allow arbitrators to decide on a case-by-case basis whether to grant these motions. Claimants, of course, would retain their right to seek post-dismissal judicial relief. Schwab believes the proposed rule removes from the arbitrators powers that have been recognized by state and federal courts.

In the event that the proposed rule is enacted, Schwab believes that additional clarity is required in the text of the rule. The proposed rule states that dispositive motions made before a hearing are *discouraged* and may only be granted in *extraordinary circumstances*. The rule does not specify what types of circumstances would qualify as "extraordinary." Since the proposed rule also empowers panels to issue sanctions if they determine a party has filed a dispositive motion in bad faith, the failure to provide additional guidance as to what qualifies as "extraordinary circumstances" will have a chilling effect on the filing of dispositive motions and may expose respondent's counsel to sanctions. This lack of guidance would be a potential pitfall for respondents and would provide claimants with an opening to seek sanctions every time a motion to dismiss is filed.

In addition, as noted in the Security Industry Association's (SIA) Comment Letter, there are situations where dispositive motions are appropriate, but may not be deemed "extraordinary" by the panel. Examples of such situations include claims that are barred by statutes of limitation; claims where there are clear contractual limitations on liability; and claims filed against individual employees of the firm who had no involvement in the dispute.

III. PROPOSED RULE 12514

Proposed Rule 12514 addresses the exchange of documents and witness lists. As drafted, Section (c) of the proposed rule states:

> "Parties may not present any documents or other materials not produced or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing."

The proposed rule creates a subtle – yet important – change from the existing rule which provides that parties are not required to turn over "copies of documents or identify witness which parties may use for cross-examination or rebuttal." *NASD Code of Arbitration Procedure Rule 10321(c).* The cross-examination language is not contained in the proposed rule. The proposal, therefore, requires parties to turn over at the twenty-day exchange documents that have not otherwise been requested or required to be turned over and are contemplated for cross-examination. The proposed rule provides no explanation for this significant change, and as drafted, Schwab opposes this portion of the proposed rule.

Forcing parties to turn over documentation that they anticipate using in cross-examination is antithetical to the concept of cross-examination. The idea of turning documents over to an opposing party in advance of cross-examination would make it more difficult for panels to discover the truth, as it would give each party nearly three weeks to formulate responses to cross-examination questions. It would also provide parties with time, in advance of the hearing, to reassess any prior inconsistent statements they may have made. The proposed rule is equally inequitable to claimants and respondents.

While Schwab supports a full and complete disclosure of documents during the discovery process, this proposed rule goes too far. Thus, Schwab requests that the NASD amend this proposal to specifically identify cross-examination documents as an exclusion to the twenty-day exchange, as currently in effect in NASD Code of Arbitration Procedure Rule 10321(c).

Thank you for considering Schwab's comments on these important issues. If you would like any additional information, please call me at (415) 636-3221.

Sincerely yours,

RICHARD A. KAROLY
Vice President and Senior Corporate Counsel
Charles Schwab & Co., Inc.